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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LUCIO LEMUS,

Plaintiff and Appellant,

v.

CALIFORNIA COMMUNITY NEWS,

Defendant and Respondent.

B185194

(Los Angeles County
Super. Ct. No. BC318926)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Robert Hess, Judge. Affirmed.

Irving Meyer for Plaintiff and Appellant.

Seyfarth & Shaw, Edith Lee and Thomas R. Kaufman for Defendant and
Respondent.

Plaintiff Lucio Lemus sued his former employer, defendant California Community News (CCN), for unpaid overtime, unfair business practice, and wrongful termination in violation of public policy. He appeals from a grant of summary judgment in favor of CCN. We affirm.

BACKGROUND

I. Plaintiff's Complaint

CCN is in the business of (among other things) placing advertising flyers into advertising packages, which are later inserted into the Los Angeles Times. Plaintiff alleged that from January 2002 to May 2004, CCN employed him as a “crew supervisor.” According to plaintiff, CCN misclassified him under California wage and hour law as a salaried employee exempt from entitlement to overtime pay for working more than 40 hours per week and 8 hours per day. Further, he alleged that CCN fired him in retaliation for his complaints about the failure to pay overtime, and about racial discrimination.

Plaintiff alleged three causes of action against CCN: (1) failure to pay overtime wages (Lab. Code, § 1194); (2) unfair business practice (based on the failure to pay overtime) (Bus. & Prof. Code, § 17200); and (3) wrongful termination based on retaliation for protected activity, in violation of the Fair Employment and Housing Act (“FEHA”; Gov. Code, § 12940).

II. CCN's Summary Judgment Motion

CCN moved for summary judgment. For discussion, we separate the parties' respective evidentiary showings into two categories: evidence regarding plaintiff's overtime claim (which claim is also the basis of plaintiff's cause of action for unfair business practice), and evidence regarding plaintiff's wrongful termination claim.

A. Overtime Claim

Before summarizing the parties' evidence on plaintiff's claim for unpaid overtime, we briefly review relevant principles of California wage and hour law. Generally, California employees who work more than 40 hours per week or 8 hours per day must be paid an overtime premium for hours worked over this limit. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 789 (*Ramirez*); Lab. Code, §§ 510, 511.) However, Labor Code section 515, subdivision (a), permits the Industrial Welfare Commission (IWC) to "establish exemptions from the requirement that an overtime rate of compensation be paid . . . for *executive*, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." (Italics added.)

In its summary judgment motion, CCN relied on the exemption for executive employees, which the IWC set forth in Wage Order 4-2001. (8 Cal. Code of Regs., § 11040, subd. (1)(A)(1).)¹ For this exemption to apply, the following requirements must be met: (1) the employee's duties and responsibilities must "involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof"; (2) the employee must "customarily and regularly direct[] the work of two or more other employees

¹ All undesignated section references are to Title 8 of the California Code of Regulations, which contains the IWC wage orders. Although the California Legislature defunded the IWC in July 2004, IWC wage orders remain in effect. (*Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 902, fn. 2.)

therein”; (3) the employee must have “the authority to hire or fire other employees or [his or her] suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status or other employees will be given particular weight”; (4) the employee must “customarily and regularly exercise[] discretion and independent judgment”; (5) the employee must be “primarily engaged in duties which meet the test of the exemption”; and (6) the employee “must . . . earn a monthly salary equivalent to no less than two (2) times the state minimum wage for full-time employment” of 40 hours a week. (§ 11040, subds. 1(A)(1)(a) – (f).)

The parties dispute only the requirement that the employee must be “primarily engaged in duties which meet the test of the exemption” (§ 11040, subd. 1(A)(1)(e)), i.e., duties involving “the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof” (*id.*, subd. 1(A)(1)(a)). We summarize the admissible evidence relevant to this issue.

1. CCN’s Evidence

CCN’s packaging department runs large machines, called SLS inserting machines, which automatically insert a single copy of an advertising flyer into a package with other flyers. The machines electronically monitor the quality of the assembly process, and reject or repair defective packages.

In January 2002, CCN promoted plaintiff to crew supervisor. Before accepting the promotion, plaintiff knew that it was a salaried position, and that he would not be paid a premium for working more than 8 hours a day or 40 hours a week.

Crew supervisors primarily watch over the floor and oversee the hourly employees who work on the SLS machines. At first, plaintiff oversaw the

operation of one or two SLS 2000 machines, and supervised the employees who worked on them, about 10 employees per machine. In December 2002, he was transferred to another department, where he performed the same basic duties supervising a day-shift crew working on the next-generation SLS machine, the SLS 3000. He supervised about 13 to 18 employees per machine, and might supervise as many as 30 employees on any given day.

In his deposition testimony, plaintiff testified that CCN's "Position Description" of the crew supervisor position accurately describes the major purpose of the job: "To . . . manag[e] and coordinat[e], through subordinate personnel, functions of the FSI inserting process. Obtain optimum effectiveness for the Packaging Department. Manage a staff of Operators, Feeders, Material Handlers, and Quality Control employees. Manage the production process and assure achievement of planned results in performance, productivity, quality and service to other departments in accordance with company goals and objectives and operating plans. In addition, ensures deadlines and postal requirements are met and assists in all reporting functions associated with the FSI inserting process."

Plaintiff also testified that he performed all but three of the "major responsibilities" set forth in the CCN's "Position Description" of crew supervisor. The "major responsibilities" plaintiff performed included providing a system of controls to identify deviations from operating plans and budgets; managing, assigning, and delegating responsibilities for specific work to subordinate personnel to accomplish departmental goals; conducting weekly production meetings with subordinates; providing and managing a safe workplace, and making recommendations for reduction of industrial accidents; recruiting, training, and managing a diverse workforce, approving new hires, and recommending personnel actions such as disciplinary measures and discharges; preparing performance reviews; managing maintenance functions so as to ensure proper operation of the

SLS machines, and recommending maintenance and troubleshooting to appropriate personnel; and ensuring quality control.

Other crew supervisors attested in declarations that they were responsible for numerous additional managerial duties that require discretion and judgment, including implementing productivity cost controls by controlling excessive overtime and excessive use of temporary employees. Jose Martinez, a crew supervisor like plaintiff, declared that he spends about three hours a day monitoring employees on the work floor, one hour addressing employee's daily work issues, one hour preparing for or attending meetings, and one to two hours on various types of supervisory paperwork. Martinez, and fellow supervisors Jose Centeno, Robert Fischer, George Gonzalez, and Alan Alvarez, stated in declarations that they spent the vast majority of their work day (from 85 percent to the entire day, depending on the declarant) performing specific supervisory duties, and only rarely operated the SLS machines.

2. Plaintiff's Evidence

In opposition to CCN's summary judgment motion, plaintiff did not dispute the vast majority of CCN's showing, except to clarify or limit portions of his duties as a crew supervisor.² According to plaintiff's evidence, crew supervisors run the SLS machines, and assist the operators in running the machines. While overseeing 30 employees, plaintiff had to watch over three or four lines, and had to assist the operators in running the machines, and in performing repairs and adjustments. He

² CCN objected to several portions of plaintiff's evidentiary showing. The trial court sustained all the objections. On appeal, plaintiff does not contest these evidentiary rulings. Thus, he has waived his right to challenge the rulings, and we disregard the excluded evidence. (*Stockinger v. Feather River Community College* (2003) 111 Cal.App.4th 1014, 1022; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015.)

did not manage inserting equipment. Although he could request additional staff, he never hired anyone, and had to ask management's permission to obtain additional personnel. He simply relayed company policy to new employees. He had no authority over budgeting. He did not have any discretion as to how much overtime operators received. Management decided how much overtime was paid.

In his declaration, plaintiff described his duties as follows: "What happened in reality was, we were told we had to be operating the machines with the operators and if the operator was absen[t] the supervisor had to run the machine for the day. We were also required to make any repairs or adjustments to the machine. We were required to stay on [our] line, by the machine, while it was running, even while the operator was present, so that we, the supervisors[,] could assist the operator in the operation of the machine."

Plaintiff also produced excerpts from the deposition testimony of Armando Hernandez. Hernandez testified that he was a "packaging supervisor" responsible for "packaging inserts . . . running three lines, four lines . . . in charge of payroll [and] employee corrective actions." In March 2002, when Hernandez was supervising only one crew, on a weekly average he either operated the machine or helped the operator operate the machine "[p]robably half the time." When Hernandez was running the machine, he was making "mechanical adjustments," which is a duty the operator performs as well. From time to time, Hernandez turned the machine on in the morning.

Hernandez worked the same shifts as plaintiff. Plaintiff did "[b]asically the same thing" Hernandez did. Hernandez was asked whether, in March 2002, plaintiff "was . . . spending about half the time operating the machine or helping the operator operate the machine." Hernandez responded, "I would say the same."

B. Wrongful Termination

The basis of plaintiff's wrongful termination claim was that, in violation of FEHA, he was discharged in retaliation for raising the issue of unpaid overtime with CCN's management, and for discussing with Operations Manager Durga Bhoj his concerns that Bhoj stereotyped Hispanic employees. On summary judgment, the primary issue in dispute was whether CCN had a legitimate, non-retaliatory reason for terminating plaintiff, namely, his once having changed the settings on an SLS machine without permission, and then lying about it.

1. CCN's Evidence

Plaintiff is of Mexican descent, and believes that Bhoj stereotyped Hispanics. Bhoj would call all Hispanic women by the name "Maria." He would ask Hispanic workers, "Is that a Mexican thing?" He would say that a worker could sweep an area because she was Mexican, and he would pretend to speak Spanish. However, Bhoj never treated plaintiff differently because of his race, and always used his proper name. During the last three to six months of his employment, plaintiff twice asked Bhoj to use people's correct names, not stereotypical names.

In a meeting in early 2003 about overtime, he noted that he had read an article about a Radio Shack class action on the exempt status of managers, thought it was similar to his situation, and believed it would be good for supervisors at CCN to get overtime. At a later meeting with Bhoj, plaintiff asked whether he was being "managed out" because he had mentioned the Radio Shack case. Bhoj told plaintiff not to worry, he was a good employee, and Bhoj had no complaints about him. Plaintiff never complained to Human Resources that he believed he had been misclassified as exempt, and never discussed the retaliation issue with anyone in management.

Crew supervisors were trained in the proper use of the SLS machine detection system and proper method of setting the system in compliance with company guidelines. According to company guidelines, crew supervisors are to set the detection system to reject double and triple flyers unless authorized by the packaging manager to change the setting because the detection system is not working properly or the flyer is designed in such a manner that the system cannot detect it.

On the morning of May 4, 2004, plaintiff operated SLS 3000 Machine No. 12 because the usual operator did not report to work. Plaintiff was the only person operating the machine from the time the machine started inserting paper until at least several minutes later. The previous night, a CCN manager had confirmed that the machine had been set to reject double and triple flyers in accordance with company policy.

The morning of May 4, Bhoj received a customer complaint regarding multiple copies of a flyer in the newspaper. In response, he inspected several SLS machines to determine whether anyone had changed the settings to accept doubles and triples. When he inspected Machine No. 12 operated by plaintiff, Bhoj noted that the settings had been changed to accept doubles and triples. When Bhoj asked plaintiff about the changed settings, plaintiff conceded that he had been the only one operating the machine, but he denied changing the settings. He later repeated that denial to Bhoj on May 7.

CCN investigated by checking the log for Machine No. 12. The log reflected that the machine started operation at 6:05:49 a.m. It also showed that for 22 seconds before the machine began running, until about one minute after it began running, someone changed the settings to accept doubles and triples. CCN concluded that plaintiff lied about changing the settings. According to CCN's employee handbook, which plaintiff received and promised to abide by, dishonesty

is unacceptable conduct. For this dishonesty, CCN dismissed plaintiff on May 7, 2004.

As a crew supervisor, plaintiff was terminable at will. Plaintiff himself admitted that if a crew supervisor changed machine settings and lied about it to his superiors, the dishonesty would be an appropriate ground for termination.

2. Plaintiff's Evidence

Plaintiff produced evidence to show he was terminated for complaining about overtime and Bhoj's comments about Hispanics.

According to plaintiff's declaration, plaintiff complained to management in April 2003 about not getting overtime pay. He mentioned it several more times to supervisors during 2003, including to his manager John Sharp in November or December 2003. In early 2004, he mentioned to Bhoj that he believed management (including John Craig) was retaliating against him for asking about overtime pay. Management began retaliating against plaintiff in early January 2004 by switching him to lines that had a lot of problems and difficult zones, and not providing him and his crew the training provided to other supervisors and crews. In March or April 2004, plaintiff complained to John Craig, the senior manager, that one of the managers was making derogatory comments about Mexican-Americans.

In his deposition, Armando Hernandez testified that at a supervisors' meeting attended by all the managers, plaintiff took a leading role in complaining about the lack of overtime pay. Jose Centeno, another supervisor, testified in his deposition that at the same meeting plaintiff stated that supervisors at times were acting as operators, but were making less money than operators, because operators received overtime. Centeno did not recall anyone else joining plaintiff in his statement. After plaintiff finished, management "just dropped it, pretty much."

III. *The Trial Court's Ruling*

The trial court concluded that the undisputed evidence showed plaintiff was properly classified as an exempt employee. Therefore, the claims for unpaid overtime and unfair business practice failed as a matter of law. The court also concluded that the wrongful termination claim failed because plaintiff lacked evidence of a causal link between any alleged “protected activity” and any adverse employment action, and because plaintiff could not raise a triable issue as to whether CCN’s legitimate reason for dismissing him was pretextual.

DISCUSSION

I. *The Overtime and Unfair Business Practice Claims*

Plaintiff contends that he raised a triable issue as to whether he falls under the exemption from overtime pay for executive employees. The only element of the exemption he disputes is the requirement that he be “primarily engaged in duties which meet the test of the exemption” (§ 11040, subd. 1(A)(1)(e)), that is, duties that “involve the management” (§ 11040, subd. 1(A)(1)(a)) of CCN’s packaging department. We conclude that plaintiff failed to raise a triable issue.

Summary judgment is granted when the moving party satisfies “the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*), fn. omitted.)

A defendant moving for summary judgment bears an initial burden of production to make a prima facie showing that one or more elements of the cause

of action cannot be established, or that there is a complete defense. The defendant may sustain this burden by showing that the plaintiff does not have, and cannot reasonably obtain, evidence to prove one or more elements of the cause of action by a preponderance of the evidence. If the defendant succeeds, the burden of production shifts to the plaintiff to make a prima facie showing that a triable issue of material fact exists as to the cause of action. (See *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

In determining whether a triable issue of material fact exists, the court must strictly construe the moving party's papers. However, the opposing party's evidence must be liberally construed to determine the existence of a triable issue of fact. "All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment." (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562; see *Aguilar, supra*, 25 Cal.4th at p. 843.)

In the instant case, plaintiff failed to raise a triable issue as to whether he was primarily involved in performing management activities. The term "[p]rimarily" . . . means more than one-half the employee's work time." (§ 11040, subd. 2(N).) In determining whether an employee is "primarily engaged" in management duties, section 11040, subdivision 1(A)(1)(e), provides in relevant part that "[e]xempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee meets this requirement." (§ 11040, subd.

1(A)(1)(e); see *Ramirez, supra*, 20 Cal.4th at p. 802 [discussing exemption for outside salespersons].)

CCN made a prima facie showing that plaintiff regularly spent more than half his time performing exempt management duties. To define management duties, section 11040, subdivision 1(A)(1)(e), refers in relevant part to the version of 29 Code of Federal Regulations section 541.102 “effective as of the date of this order,” and states that “[t]he activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed” in that federal regulation.³ As of the time section 11040 was enacted, 29 Code of Federal Regulations section 541.102 contained a non-exhaustive list of management duties.⁴ The list included “training of employees; . . . directing their work;

³ Section 11040, subdivision 1(A)(1)(e) provides more fully: “The activities constituting exempt work and non-exempt work shall be construed in the same manner as such items are construed in the following regulations under the Fair Labor Standards Act effective as of the date of this order: 29 C.F.R. Sections 541.102, 541.104-111, and 541.115-16. Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer’s realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.”

⁴ The applicable version of 29 Code of Federal Regulations section 541.102 is the version as revised July 1, 2000. It provided:

“(a) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases, the bona fide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.

“(b) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee in the management of his department or the supervision of the employees under him: Interviewing, selecting, and training of

maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; [and] controlling the flow and distribution of materials or merchandise and supplies.”

In the instant case, CCN introduced evidence showing that plaintiff’s job required him to perform all these managerial duties. That showing consisted of evidence of the formal job description of “crew supervisor” (which plaintiff conceded “accurately described the ‘major purpose’ of a crew supervisor”), evidence of the “major responsibilities” of the job that plaintiff performed, and evidence of the amount of time regularly spent by four of plaintiff’s fellow supervisors in performing supervisory duties (85 percent to 99 percent, depending on the supervisor). This evidence tended to show that CCN realistically expected plaintiff would spend the vast majority of his work on exempt management functions, and that this expectation was in line with the realistic requirements of the job. Further, it was sufficient to justify the inference that plaintiff, like his fellow supervisors mentioned in CCN’s showing, spent more than half his time on exempt functions.

employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.”

Thus, CCN's showing established that during the period charged in plaintiff's complaint (Jan. 2002 through May 2004) plaintiff customarily spent more than half his time on exempt management duties. In response, plaintiff failed to raise a triable issue.

As to the "first and foremost" consideration -- "[t]he work actually performed by the employee during the course of the workweek . . . and the amount of time the employee spends on such work" (§ 11040, subd. 1(A)(1)(e)) -- the only admissible evidence plaintiff produced was the deposition testimony of fellow supervisor Armando Hernandez.⁵ In that testimony, Hernandez testified that in March 2002 he spent "[p]robably half the time" operating or helping to operate SLS machines, and that as of March 2002 Hernandez "would say [that plaintiff did] the same." This testimony, however, specifically related to plaintiff's activities in March 2002.⁶ It was insufficient to raise a triable issue whether during the entire period charged in plaintiff's complaint (Jan. 2002 through May 2004) plaintiff customarily spent half his time during his work week operating or helping operate the SLS machines.

Plaintiff also failed to produce admissible evidence sufficient to create a triable issue regarding whether CCN realistically expected that plaintiff would

⁵ In his opening brief, plaintiff relies on additional evidence, namely, a statement in his declaration that he "worked about 60% to 80% running or assisting the operator run the packaging machine," and a statement in the declaration of Mary Louise that she spent 60 percent of her time operating or assisting the operation of the machine, as did plaintiff. However, the trial court sustained CCN's objections to that evidence, and on appeal plaintiff does not contest the rulings. Therefore, we assume the objections were properly sustained, and disregard the evidence. (See fn. 2, *ante*.)

⁶ "Q [A]nd again, in March of 2002, was he [plaintiff] spending about half the time operating the machine or helping the operator operate the machine? [¶] A [by Hernandez] I would say the same."

spend the vast majority of his work on exempt management functions, and whether this expectation was in line with the realistic requirements of the job. In his declaration, plaintiff declared that supervisors were required to make “repairs or adjustments” to the SLS machine, that they were required to stay at the machine to assist the operator in running it, and that they had to operate the machine on any day the operator was absent. Armando Hernandez testified at his deposition that an SLS machine required constant monitoring, and that he (as a supervisor) was “seeing if it needs adjustment.” He also testified that the operator would do that as well.

Exempt work includes “all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions.” (§ 11040, subd. 1(A)(1)(e).) By example, former 29 Code of Federal Regulations section 541.108, which is included in the federal regulations referred to by section 11040, subdivision 1(A)(1)(e), provided in relevant part: *“Watching machines is another duty which may be exempt when performed by a supervisor under proper circumstances. Obviously the mere watching of machines in operation cannot be considered exempt work where, as in certain industries in which the machinery is largely automatic, it is an ordinary production function. Thus, an employee who watches machines for the purpose of seeing that they operate properly or for the purpose of making repairs or adjustments is performing nonexempt work. On the other hand, a supervisor who watches the operation of the machinery in his department in the sense that he ‘keeps an eye out for trouble’ is performing work which is directly and closely related to his managerial responsibilities. Making an occasional adjustment in the machinery under such circumstances is also exempt work.”* (29 C.F.R. § 541.108, subd. (f) (as revised July 1, 2000), italics added.)

The evidence is undisputed that crew supervisors are responsible for supervising the operators of the SLS machines, managing maintenance functions so as to ensure proper operation, and maintaining production and quality control. In that context, plaintiff's evidence merely shows that in the performance of these management duties, crew supervisors "keep[] an eye out for trouble" (former 29 C.F.R. § 541.108, subd. (f)), make occasional adjustments or repairs to the SLS machines, and fill in when the operator is absent. Such duties are closely related to a crew supervisor's managerial functions, and are a means to carry out those functions. Therefore, they qualify as exempt duties.

We conclude that plaintiff failed to raise a triable issue whether he primarily performed management duties. Therefore, the trial court properly adjudicated the first cause of action for unpaid overtime, and the second for unfair business practice (which was based on the failure to pay overtime) in CCN's favor.

II. The Wrongful Termination Claim

Plaintiff contends that he raised a triable issue concerning whether CCN fired him for complaining about the lack of overtime pay and racial harassment. Therefore, he argues, the trial court erred in adjudicating his wrongful termination claim. We disagree.

CCN produced evidence that it terminated plaintiff for a legitimate, nondiscriminatory reason. On May 4, 2004, Bhoj received a customer complaint regarding multiple copies of a flyer in the newspaper. During his inspection of several SLS machines, he found that the settings on the machine being operated by plaintiff had been changed to accept double and triple copies of fliers. When Bhoj asked plaintiff about the changed settings, plaintiff conceded that he had been the only one operating the machine, but he denied changing the settings. CCN investigated by checking the log for the machine. The log showed that 22 seconds

before the machine began operation, until about one minute after it began operation, the settings had been changed to accept doubles and triples. On May 7, 2004, plaintiff again told Bhoj that he did not change the settings. CCN concluded that plaintiff was lying about changing the settings, and terminated him that day. In his deposition, plaintiff himself admitted that if a crew supervisor changed machine settings and lied about it to his superiors, the dishonesty would be appropriate grounds for termination.

CCN's evidence of its nondiscriminatory reason for terminating plaintiff shifted the burden of production to plaintiff to raise a triable issue as to whether CCN's stated reason was a mere pretext. "[T]he plaintiff may establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" [Citations.] Circumstantial evidence of "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis. [Citations.]" (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68-69 (*Morgan*); see *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156 ["Absent "substantial responsive evidence . . . of the untruth of the employer's justification or a pretext, a law and motion judge may summarily resolve the discrimination claim"""].)

In the instant case, plaintiff presented no admissible evidence to rebut CCN's conclusion that he changed the settings on the SLS machine, and twice lied about it to Bhoj.⁷ Further, he failed to present substantial evidence that CCN's

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In his opening brief, plaintiff relies on a passage in his declaration in which he speculates that the settings could have been changed by others. However, the trial court sustained CCN's objection to that portion of plaintiff's declaration, and we therefore disregard it. (See fn. 2, *ante*.) In any event, such speculation is not the equivalent of

conclusion that he was dishonest about changing the settings was a mere pretext designed to obscure a retaliatory motive for his termination. His admissible responsive evidence consisted primarily of his own declaration, in which he stated that from April to December 2003 he complained several times to managers about not getting overtime pay. In early January 2004, he was moved to a more difficult line, and he and his crew received less training than other supervisors and crews. In March or April 2004, he complained to the senior manager, John Craig, about Bhoj's comments concerning Hispanics. In May 2004, he was terminated. Plaintiff also relied on evidence that fellow crew supervisors considered him to be a good supervisor.

This evidence, however, raises no more than speculation concerning whether plaintiff was terminated based on his complaints about overtime and Bhoj's comments. It certainly does not rise to the level of "specific" and "substantial" evidence (*Morgan, supra*, 88 Cal.App.4th at p. 69) that the true reason for plaintiff's termination was retaliatory, especially when considered against the strength of CCN's showing and plaintiff's concession that a supervisor's dishonesty about changing SLS machine settings is an appropriate ground for termination. We conclude that plaintiff failed to raise a triable issue concerning whether CCN's proffered reason for his termination was pretextual.⁸ Therefore, the trial court properly adjudicated the wrongful termination claim in CCN's favor.

"substantial evidence" necessary to rebut CCN's showing that plaintiff did, indeed, change the settings and lie about it to Bhoj.

⁸ Because we conclude that the trial court properly granted summary judgment, we do not discuss the subsidiary issue whether the trial court properly adjudicated plaintiff's punitive damage claim in favor of CCN.

DISPOSITION

The judgment is affirmed. Respondent shall receive its costs on appeal.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.